No. _____

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

REMINGTON LODGING & HOSPITALITY, LLC,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
CASE NOS. 29-CA-093850 & 29-CA-095876

PETITION FOR REVIEW

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REMINGTON LODGING & HOSPITALITY, LLC,

Petitioner,

v. No._____

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW

Remington Lodging & Hospitality, LLC ("Remington"), a Delaware corporation with its office and principal place of business located at 14185 Dallas Parkway, Dallas, Texas, hereby petitions the Court to review and set aside a decision and order of the National Labor Relations Board ("Board") issued against Remington on February 12, 2016, in NLRB Case Nos. 29-CA-093850 and 29-CA-095876, reported at 363 NLRB No. 112. Remington avers:

1. The Board's decision and order is a final order within the meaning of Section l0(f) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(f), and Remington is a party aggrieved by said order.

2. This Court has jurisdiction over this cause under Section 10(f) of the Act.

3. The Board's decision and order against Remington is not supported by substantial evidence and is contrary to law.

4. The filing fee due under the Court's Rules is submitted simultaneously herewith.

WHEREFORE, Remington respectfully prays that this Court review and set aside the Board's order and that Remington receive any further relief to which it may be entitled.

Respectfully submitted, this 22nd day of February, 2016.

STOKES WAGNER, ALC

/s/ Karl M. Terrell

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UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT COURT OF APPEALS

REMINGTON LODGING & HOSPITALITY, LLC,

Petitioner,

v. No._____

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Petition for Review was served by U.S. First Class Mail on February 22, 2016, to the following:

Richard F. Griffin, Jr.
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/s/ Karl M. Terrell

Karl M. Terrell

Remington Lodging & Hospitality, LLC *and* Remington Lodging & Hospitality, LLC and Hospitality Staffing Solutions, LLC, joint employers *and* Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades. Cases 29–CA–093850 and 29–CA–095876

February 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 15, 2013, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as further explained below and to adopt the judge's recommended Order as modified.[2]

The Respondent is a hotel management company. At issue is the Respondent's conduct at a Hyatt hotel in Hauppauge, New York, in response to the Union's efforts to organize the hotel's housekeeping employees in 2012. The judge found that the Respondent unlawfully subcontracted the housekeeping work and discharged the housekeeping employees, and then unlawfully refused to rehire them 2 months later, when the subcontract was canceled. The judge further found that the Respondent unlawfully discharged employee Margaret Loiacono in January 2013 because it believed she would impede the Respondent's antiunion campaign. We adopt these findings, for the additional reasons and with the clarifications discussed below.

I. THE AUGUST 20 SUBCONTRACTING AND DISCHARGE AND OCTOBER 19 REFUSAL TO HIRE

The Respondent began managing the Hyatt in December 2011. In April 2012,[3] an agent of the Union began visiting the hotel and communicating with employees about organizing. As described in more detail in the judge's decision, from May through early August, hotel management coercively interrogated or threatened employees about union activity on six occasions. Sometime between mid-June and June 28, the Respondent began to explore the possibility of outsourcing its housekeeping

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by unlawfully interrogating or threatening employees on six occasions from May through early August 2012. As to one of those occasions, in early July, we agree with the judge that the Respondent violated Sec. 8(a)(1) when Housekeeping Supervisor Percida Rosero told employee Veronica Flores that the Union would refuse to work with people who were undocumented. We find it unnecessary to pass on the judge's finding that Rosero made additional coercive statements during this same conversation, as the additional violations would not affect the remedy.

We also adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by unlawfully interrogating or threatening employees on six occasions in late August and September 2012. We find it unnecessary, however, to pass on Human Resources Director Osiris Arango's September 5 statements to employee Estela Cabrera.

For the reasons stated in the judge's decision, we adopt his finding that the Respondent violated Sec. 8(a)(1) by stating in its campaign literature that it would more strictly enforce workplace rules if the employees selected the Union. In doing so, we do not rely on *Olympic Supply, Inc. d/b/a Onsite News*, 359 NLRB No. 99 (2013), cited by the judge. We rely instead on *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010). Furthermore, we reject the Respondent's contention that the judge's ruling permitting the General Counsel to amend the complaint during the hearing to add this allegation deprived the Respondent of due process. Under Sec. 102.17 of our Rules, a complaint may be amended during the hearing "upon such terms as may be deemed just." To determine whether an amendment is just, the Board evaluates three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171 (2006). Beginning with the second factor, we find that the General Counsel offered a valid excuse for the delay. The leaflet upon which the allegation is based was within the scope of the General Counsel's timely subpoena, and the Respondent did not provide it to the General Counsel until March 13, 2013 (the hearing began on March 6). Thus, any surprise or lack of notice was owing to the Respondent's own delay in furnishing the subpoenaed document. Finally, the complaint was amended on March 18, 2 days before the hearing closed. Thus, the Respondent had the opportunity to introduce relevant evidence, and it also had the opportunity to address the lawfulness of the statement in its posthearing brief to the judge and to us on exceptions. Accordingly, we find no violation of the Respondent's due process rights.

[2] We have modified the judge's recommended Order to conform to the judge's remedy and the Board's standard remedial language. In requiring the Respondent to compensate employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each employee, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the Order as modified and in accordance with our decisions in *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and *Durham School Services*, 360 NLRB No. 85 (2014).

[3] All dates are in 2012, unless otherwise noted.

work at the hotel. On August 16, the Respondent entered into a contract with Hospitality Staffing Solutions (HSS) to manage the housekeeping operations at the hotel.

On August 20, the Respondent notified its housekeeping employees of the contract with HSS, which would take effect the following day. The Respondent instructed the employees to fill out applications if they wished to be hired by HSS. Later that day, the Union filed its first representation petition with the Board.[4] On August 21, HSS hired most of the Respondent's employees. During August and September, after the HSS contract took effect, the Respondent complained to HSS about several issues, including the level of staffing, wages, and the lack of a trainer. On September 19, HSS notified the Respondent of its intent to terminate the contract in 30 days. On October 19, the contract termination date, the Respondent fired the discriminatees and told them that the Respondent would not rehire them. The Respondent staffed its housekeeping department with a new set of employees it had recruited earlier and trained offsite.

A. The Subcontracting and Discharges

We agree with the judge's finding that the decision to subcontract was motivated by the employees' union activity, and therefore unlawful. The General Counsel met his initial *Wright Line*[5] burden by showing union activity, employer knowledge of that activity, and animus. See, e.g., *Approved Electric Corp.,* 356 NLRB 238 (2010). The element of union activity is undisputed. As shown, a union agent began visiting the hotel in April, and the Respondent's first steps toward outsourcing the housekeeping work began soon afterwards. The Respondent's knowledge of and animus toward the union activity are established by the two unlawful interrogations that occurred in May and early June.[6] See *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 5 (2014) (unlawful interrogations and threats evidenced antiunion animus); *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004) (temporal proximity between union activity and employer's adverse action is evidence of unlawful motivation).[7]

Turning to the Respondent's rebuttal burden, we agree with the judge that the Respondent failed to prove that it would have subcontracted the work even absent the employees' union activity. Indeed, the reasons the Respondent proffered—low customer service scores and inability to obtain adequate staffing levels—do not withstand scrutiny. The Respondent had had low scores for at least 8 months prior to the subcontracting, and the Respondent acknowledged that the hotel's low scores were unrelated to the quality of the employees' work. The Respondent's hotel had ranked at or near the bottom of all Hyatt hotels in the U.S. since at least December 2011, when the Respondent took over managing the hotel. But it was not until shortly after the Respondent learned of union activity that it decided to subcontract the housekeeping work. Furthermore, during the 30-day period between HSS' September 19 notice that it was terminating the contract and the October 19 termination date, the

[4] The Union later withdrew that petition. It filed a new petition on September 11, which it amended on September 21 and October 16.

[5] 251 NLRB 1083, 1088 fn. 11, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the employer's decision. To do so, the General Counsel proves the existence of union activity, employer knowledge of the union activity, and employer animus against the employees' protected conduct. The burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. E.g., *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004).

[6] As additional evidence of animus, we note that Supervisor Rosero told employee Maritza Torres on August 21, the day the housekeeping subcontract took effect, that the subcontracting was happening because of the Union. See generally *TCB Systems, Inc.,* 355 NLRB 883, 885 (2010) (reasonable to infer that supervisor knows reason for adverse action even if not personally involved; supervisor's explanation is evidence of unlawful motive when set forth as fact and devoid of evidence suggesting fabrication), enfd. 448 Fed. Appx. 993 (11th Cir. 2011).

An additional unlawful interrogation occurred in late June, when the director of housekeeping asked an employee to identify a photo of the union agent who had previously been canvassing the facility. The judge did not determine whether this incident occurred before or after the Respondent's decision to outsource the housekeeping work to HSS.

[7] The dissent asserts that the record fails to show that the Respondent knew of employees' union activity. We disagree. The Respondent's interrogations demonstrate, at the very least, a suspicion that employees were engaging in union activity, and "knowledge or suspicion" is sufficient to satisfy the knowledge element under *Wright Line*. See, e.g., *Kajima Engineering & Construction, Inc.*, 331 NLRB 1604, 1604 (2000). See also *Hartman & Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc.*, 361 NLRB No. 59, slip. op. at 1 fn. 1 (2014) (inferring knowledge based in part on unlawful interrogation); *Evenflow Transportation, Inc.*, 358 NLRB 695, 697 (2012) (interrogations and threats confirmed general knowledge that a renewed organizing campaign was under way and that it had taken root among employees), incorporated by reference 361 NLRB No. 160 (2014); *McLean Roofing Co.,* 276 NLRB 830, 833 (1985) (interrogations showed that respondent "specifically suspected" employees' involvement in union campaign). In addition to the unlawful interrogations, we note that after Union Agent Jose Vega began visiting the hotel and distributing authorization cards, housekeeping employee Veronica Flores became Vega's liaison with the other housekeeping employees. Vega and Flores planned a union meeting for about June 10—before or around the same time as the Respondent began to explore the possibility of outsourcing the housekeeping work. Flores later told Vega that management learned of the meeting, and the meeting was subsequently canceled. Finally, on July 1, in response to a June 30 HSS email asking if there were any issues with unions at the property, the Respondent replied that union organizing was "at play" and had "heated up" within the past year.

Respondent recruited and trained, offsite and in secret, an entirely new housekeeping staff, undermining its stated reason for subcontracting: inability to adequately staff its housekeeping department. Because the evidence establishes that the Respondent's proffered reasons are pretextual, the Respondent necessarily fails to meet its rebuttal burden. See, e.g., *Auto Nation, Inc. and Village Motors, LLC d/b/a Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014), enfd. sub. nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

The dissent argues that there is no evidence of discrimination that tended to "encourage or discourage" union membership, because almost all housekeeping employees were eventually rehired by HSS for higher wages. But the Act does not require specific, independent evidence of a tendency to encourage or discourage union membership. Under *Wright Line*, supra, which established the analytical framework, subsequently approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983), for proving discrimination that tends to encourage or discourage union membership, if the General Counsel establishes that the discharges were motivated by antiunion animus, and the employer has not shown it would have taken the same action in the absence of union activity, the violation has been established as a matter of black-letter law.[8] If the discriminatees ultimately suffered little or no harm, that goes to the remedy, not to whether there was a violation in the first place.[9]

Finally, the dissent asserts that the joint-employer status of the Respondent and HSS after the subcontracting undermines our finding that the subcontracting was discriminatory or would tend to encourage or discourage union membership. It argues that the Respondent knew it would still have a duty to bargain if the employees selected a union. We disagree. Even assuming the Respondent knew that, the employees would not. Moreover, even if the Respondent knew that it would have a bargaining obligation if the Union was certified pursuant to a vote after the subcontracting, it failed to disclose that fact to the employees when it announced the subcontracting, or at any time thereafter.[10]

Accordingly, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging the housekeeping employees and subcontracting their work.[11]

B. The Refusal to Hire

We also agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the incumbent housekeeping employees on October 19,[12] at the termination of the contract with HSS. In reaching this finding, the judge applied the refusal-to-hire test stated in *FES*, *a Division of Thermo Power,*[13] which requires, in part, a showing that the respondent was hiring or had concrete plans to hire and that the applicants had experience and training relevant to the available positions. We find it inappropriate to apply *FES* here, where the alleged discriminatees were already performing the work in question. See *Planned Building Services, Inc.*, 347 NLRB 670, 673 (2006) (holding that the elements of the General Counsel's initial burden under *FES* do not apply where the case is analogous to a discriminatory discharge because the alleged discriminatees have already been performing the work). Rather, we find that *Wright Line* is the appropriate analytical framework.

Applying *Wright Line*, we agree with the judge's finding that the Respondent decided not to hire the housekeeping employees because of their continuing union activities. To begin, the General Counsel has carried his initial *Wright Line* burden. Union activity was occurring,

[8] Cf. *Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB*, 347 U.S. 17, 52 (1954) ("[I]t was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved."). All of the cases cited in the dissent on this point predated *Wright Line*.

[9] The dissent's other arguments on this point are also unpersuasive. He contends that the employees must not have been "discouraged" because union activity continued after the subcontracting, but a subjective finding of encouragement or discouragement has never been required. See *Radio Officers' Union*, supra at 50–51. He further finds no "adverse action" because most of the employees were rehired by HSS. The fact that they were rehired, however, does not negate the adverse action of the initial discharge. Moreover, some employees, as stated above, were not rehired.

[10] To the extent the dissent suggests that the joint-employer finding means there was no discharge, we disagree. The employees were told their work was being outsourced, and they were required to reapply for employment with HSS.

[11] The judge's recommended Order appropriately requires the Respondent to offer reinstatement to all discriminatees discharged on August 20, 2012, as a result of the Respondent's unlawful subcontracting, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. An undetermined number of these employees were not hired by HSS, apparently because they failed to pass drug screens, background checks, or HSS' E-Verify requirements. We leave to compliance the question of any particular discriminatee's eligibility for reinstatement and backpay. See, e.g., *Rogan Bros. Sanitation, Inc.*, 357 NLRB 1655, 1658 fn. 4 (2011) (leaving to compliance the effect of employees' immigration status on their reinstatement); *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003).

[12] The judge found it unnecessary to decide whether the Respondent's conduct on October 19, as a single employer or joint employer with HSS, also amounted to an unlawful discharge. The judge reasoned that the remedy—(re)instatement and backpay—would be the same. There are no exceptions to the judge's failure to find the October 19 unlawful discharge violation.

[13] 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

with the Respondent's knowledge, before and during the brief period of the subcontract. Specifically, the Union filed a new representation petition on September 11 and amended it on October 16, just days before the termination of the contract. Animus is established by the multiple unlawful interrogations and threats that occurred before and throughout the duration of the contract.

In agreement with the judge, we find that the Respondent's asserted reasons for not hiring the discriminatees are pretextual. Specifically, we reject the Respondent's contention that it decided not to hire the current staff because it thought that HSS would try to employ those staff members elsewhere, leaving the Respondent to hire and train a new staff when the contract terminated. The record evidence directly contradicts this contention. HSS made it plain on September 19, when it gave notice that it would terminate the contract in 30 days, that the Respondent was free to rehire the existing staff without penalty. Notwithstanding HSS' assurances, the Respondent covertly recruited and trained an entirely new housekeeping staff before October 19.

Because the Respondent's asserted reasons were pretextual, it is unnecessary to reach the second step of the *Wright Line* analysis. See, e.g., *Libertyville Toyota*, above. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to hire the housekeeping employees after the termination of the HSS contract.

II. EMPLOYEE MARGARET LOIACONO'S DISCHARGE

We agree with the judge that the Respondent violated Section 8(a)(1) by discharging employee Loiacono. As explained below, the evidence shows that the Respondent terminated Loiacono because it believed that she had engaged in protected activity and would continue to do so.

In late December 2012, as part of its campaign against the Union, the Respondent distributed to each employee a pie chart setting forth the employee's compensation and how it was allocated. The ostensible purpose of the chart was to demonstrate to employees that they received compensation and benefits beyond their base salary. On December 30, Loiacono, a lobby ambassador charged with greeting guests, left her post for 10 to 15 minutes to discuss her pie chart with Supervisor Yohenna Borrero. Loiacono informed Borrero that the chart was inaccurate because it allocated a portion of her compensation to a uniform allowance, and she did not wear a uniform. Loiacono stated that other employees' charts might also contain mistakes. Later that day, Loiacono repeated her concerns to the Respondent's general manager, Jeff Rostek, and suggested that the chart be corrected. Still later that day, management spoke to Loiacono and two other employees about the difficulty employees would face in obtaining a collective-bargaining agreement and the Respondent's purported freedom not to honor one.

The next day, the Respondent's housekeeping manager, Andrew Arpino, sent Rostek an email containing a "statement" of Supervisor Borrero recounting her conversation with Loiacono the previous day. The statement purported to be Arpino's typewritten transcription of Borrero's oral account. According to the statement, Loiacono asserted that the Respondent should pay her the equivalent of a uniform allowance and should do the same for Borrero, accused the Respondent of "lying to the people," said "that was against the law," and threatened to sue the hotel. The statement also noted that Loiacono had been communicating with another employee, Ken, about the pie chart discrepancies, and that Loiacono was waiting for Ken to discuss the issue with Rostek. The Respondent discharged Loiacono on January 2, 2013.

The judge found that Loiacono's conduct on December 30 was not concerted, and there are no exceptions to that finding. Nevertheless, we agree with the judge that her discharge was unlawful. An election petition was pending and the pie charts were distributed as part of the Respondent's antiunion campaign. Arpino's email, which the judge characterized as "colorful," makes clear that management was sufficiently concerned about Loiacono's complaints to take a statement from Borrero and forward it to high-level management.[14] Loiacono was discharged 2 days later. Regardless of whether Loiacono's initial complaints constituted Section 7 activity, the record supports an inference that the Respondent believed that Loiacono would speak out against the Respondent's position in the campaign and would incite others to do the same. By discharging her for that reason, the Respondent violated Section 8(a)(3) and (1) of the Act. See *Dayton Hudson Department Store Co.*, 324 NLRB 33, 35 (1997) (it is "immaterial that the employee was not *in fact* engaging in union activity as long as that was the employer's perception and the employer was motivated to act based on that perception"); see also *Parexel International, LLC*, 356 NLRB 516, 517 (2011) (employer violated 8(a)(1) by discharging an employee to prevent her from discussing wages and discrimination with other employees; regardless of whether the employee's initial conversations were protected, her discharge was "a pre-emptive strike to prevent her from engaging in activity protected by the Act").[15]

[14] The judge also noted that the Respondent did not offer testimony from Borrero.

[15] Contrary to the dissent, the legality of the discharge does not turn on whether Loiacono in fact engaged in protected concerted activity.

The Respondent argues that Loiacono was discharged for leaving her post and that it had previously disciplined or discharged two other employees for the same infraction. Those two employees, however, were not similarly situated to Loiacono; they were disciplined for ignoring lobby guests while engaging in a sports discussion. The context surrounding Loiacono's infraction was markedly different: she was away from the lobby specifically because she was talking to management about the discrepancy in the pie charts, materials distributed by the Respondent to advance its antiunion campaign.

Accordingly, we affirm the judge's finding that Loiacono's discharge violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Remington Lodging & Hospitality, LLC, Hauppauge, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

"(e) Compensate the discriminatees for the adverse income tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each employee."

Dated, Washington, D.C. February 12, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

This case involves a Hyatt hotel that had outsourced its housekeeping operations to a vendor, Hospitality Staffing Solutions (HSS). In December 2011, Respondent Remington Lodging & Hospitality, LLC (Remington) took over the hotel and directly hired HSS' housekeeping employees. Remington experienced retention problems and low guest satisfaction scores for about 6 months. On June 28, 2012,[1] Remington contacted HSS about possibly reinstating the outsourcing of housekeeping operations. On August 16, Remington and HSS executed an outsourcing contract with an effective date of August 21. On August 20, Remington informed the housekeeping employees that HSS was taking over the housekeeping function, and Remington reinstituted the outsourcing of housekeeping operations to HSS the following day. HSS rehired virtually all housekeeping employees with substantial pay raises.[2] However, Remington continued to employ a director of housekeeping and two housekeeping supervisors.[3] On September 19, HSS gave notice to Remington that it was terminating the housekeeping contract, and the contract was terminated effective October 19. On October 19, Remington resumed responsibility for the hotel's housekeeping function, except all of the HSS housekeeping employees had their employment terminated, and Remington hired an entirely new set of housekeeping employees.

The record shows that there was union organizing activity at the hotel beginning in April 2012, when a union organizer visited the hotel, and that management had learned of organizing activity by June 10. On August 20, after Remington informed the housekeeping employees that HSS was taking over housekeeping operations, the Union filed a representation petition seeking to represent the housekeeping employees. A new petition seeking to represent those employees was filed on September 11 and was subsequently amended.[4]

Rather, the key point is that the Respondent discharged her because it *believed* that she had done so or would do so. See *Dayton Hudson Department Store Co.,* supra; *Monarch Water Systems,* 271 NLRB 558, 558 fn. 3 (1984) ("[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.").

[1] Unless otherwise indicated, all dates hereafter are in 2012.

[2] One former Remington employee was excluded from HSS' agreement to offer employment to all Remington housekeeping employees (see judge's decision at fn. 5). However, there is no allegation that this individual's exclusion resulted from unlawful antiunion motivation or the employee's involvement in protected concerted activities. The record also reveals that some employees were not hired by HSS because of their inability to pass a drug screen or to establish lawful work authorization, required under the Immigration Reform and Control Act, when their immigration status came into question after HSS ran them through E-Verify.

[3] Based on Remington's continued employment of the director of housekeeping and two housekeeping supervisors, the judge found that Remington retained supervisory control over the housekeeping employees, and he concluded that Remington and HSS were joint employers of the housekeeping employees during the period of the Remington-HSS subcontract. See judge's decision at fn. 9. There are no exceptions to the judge's joint-employer finding, with which I agree.

[4] The September 11 petition named Remington and HSS as the employers, but the more recent amended petition named only Remington as the employer.

I agree with my colleagues that Remington coercively interrogated at least one employee regarding union activities in violation of Section 8(a)(1) of the Act, and that certain statements by Remington constituted union-related threats also in violation of Section 8(a)(1).[5] I also agree that Remington violated Section 8(a)(3) and (1) of the Act when it refused, based on antiunion considerations, to hire the housekeeping employees on or about October 19, the date the HSS contract terminated.[6] I join my colleagues in finding that this mass refusal-to-hire violation constitutes egregious misconduct.[7] However, I believe the record fails to support a finding that Remington violated Section 8(a)(3) when it subcontracted the housekeeping operations to HSS or terminated the employment of Margaret Loiacono. As to these two allegations, therefore, I respectfully dissent for the reasons set forth below.

1. *Remington's Reinstatement of Housekeeping Outsourcing to HSS Did Not Violate the Act*. When Remington began managing the Hyatt hotel located in Hauppauge, New York, this was the first Hyatt hotel that Remington had managed, and Remington wanted to establish its reputation within Hyatt as a manager of the Hyatt brand. When Remington took over the hotel's management, the hotel's guest satisfaction scores were in the bottom percentile for all Hyatt hotels. After 6 months of persistently low scores, the Respondent looked at the possibility of reinstating Hyatt's previous practice of subcontracting the hotel's housekeeping operations to HSS. As stated above, Remington contacted HSS on June 28, various exchanges and negotiations ensued, and Remington and HSS entered into an outsourcing contract on August 16, which was announced to the housekeeping employees on August 20 and became effective on August 21. When the outsourcing arrangement was implemented, *all* of Remington's housekeeping employees (with the exceptions noted above resulting from HSS' normal pre-employment screening requirements)[8] continued performing the same work at the same location and with the same supervisors. Moreover, the judge found that the housekeeping employees received substantial wage increases, based on HSS' insistence that their prior wages were not high enough to attract suitable and sufficient employee applicants.

When dealing with fundamental questions such as whether a particular entity desires to continue its status as an employer, the courts have emphasized the need to ensure that findings of unlawful motivation are based on record evidence. In *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Supreme Court quoted with approval the court of appeals' observation that the Act "does not compel a person to become

[5] For the reasons described by the judge and my colleagues, I agree that Remington violated Sec. 8(a)(1) when (i) Director of Housekeeping Andrew Arpino in June called Veronica Flores into his office and questioned her about the Union; (ii) Housekeeping Supervisor Percida Rosero in July informed Flores that the Union would refuse to work with employees who were undocumented; and (iii) Housekeeping Supervisor Rosero in early August stated that employees would be dismissed if they talked to the Union and the Union would not work with employees who were undocumented. I find it unnecessary to reach the other statements my colleagues find to be interrogations or threats in violation of Sec. 8(a)(1) because doing so would not affect the remedy. I agree with my colleagues that Remington violated Sec. 8(a)(1) by stating in its campaign literature that it would more strictly enforce workplace rules if the employees selected the Union, and I also agree, for the reasons my colleagues state, that the judge properly permitted the General Counsel to amend the complaint to add this allegation.

[6] The record supports a finding that Remington was motivated by antiunion discrimination when it decided not to hire the former HSS housekeeping employees at the termination of the outsourcing arrangement, and I agree that Remington did not satisfy its burden under *Wright Line* to prove that it would have failed to employ the HSS housekeeping employees even in the absence of union considerations. *Wright Line*, *a division of Wright Line, Inc.,* 251 NLRB 1083, 1086 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In particular, as the judge noted, Remington did not call a single witness who could identify who made the decision not to hire the HSS housekeeping employees or when that decision was made, nor did any Remington official testify that he or she made this decision. Although Remington explained the prior outsourcing of housekeeping operations to HSS based primarily on low guest satisfaction scores—and as I explain below, I believe this prior outsourcing was lawful—this does not reasonably explain its failure to hire any HSS housekeeping employees when the outsourcing arrangement ended. Remington did not attribute the low guest satisfaction scores to the quality of the housekeeping staff. Rather, the hotel received low guest satisfaction scores for its guest rooms because (as the judge found) "Remington simply could not employ enough [housekeeping] workers to get the job done right." The record also renders implausible the refusal-to-hire justifications proffered by Remington's witnesses: that (to quote the judge) Remington otherwise "couldn't be sure that HSS wouldn't try to have these employees work elsewhere" and "could not be sure it would have an adequate staff available when it resumed control of the housekeeping operations." These explanations are contradicted by evidence that when it received 30 days' notice of contract cancellation from HSS, Remington could have contacted the HSS housekeeping employees to ascertain their willingness to accept reemployment by Remington. Furthermore, HSS' notice of termination stated that HSS had no objection if Remington hired "HSS employees currently employed at the property." Finally, HSS had been unable to secure other business in the vicinity of Remington's Hauppauge, New York Hyatt hotel, and the judge found this was known to Remington, rendering implausible Remington's claimed concern that HSS might "try to have these employees work elsewhere."

[7] Like my colleagues, I adopt the judge's recommended broad cease-and-desist order. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (broad order warranted where respondent is shown to have a proclivity to violate the Act or has engaged in egregious or widespread misconduct).

[8] As noted in fn. 2, several individuals were not employed by HSS, but there is no evidence that this resulted from antiunion discrimination or protected concerted activity in violation of Sec. 8(a)(3) or (1).

or remain an employee. *It does not compel one to become or remain an employer*. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met."[9] More generally, the Supreme Court stated in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965):

> Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute, there must be both discrimination and a resulting discouragement of union membership. *It has long been established that a finding of violation under this section will normally turn on the employer's motivation*. . . . But we have consistently construed the section *to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership*. . . . Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise.[10]

In my view, there are several deficiencies in my colleagues' finding that Remington's outsourcing of housekeeping operations to HSS resulted from unlawful anti-union motivation in violation of Section 8(a)(3).

First, Section 8(a)(3) only prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment" that tends "to encourage or discourage membership in any labor organization." See *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 42–43 (1954) ("The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. . . . Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."); *B.G. Costich & Sons, Inc. v. NLRB*, 613 F.2d 450, 455 (2d Cir. 1980) ("[I]t is patent that no inquiry into motivation is necessary unless that conduct is first found to have encouraged or discouraged union membership . . . or at the very least, until it is shown that the conduct 'could have adversely affected employee rights to *some* extent. . . .'") (quoting *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 34 (1967)). Here, the record fails to support an inference that the outsourcing of housekeeping functions to HSS tended to "encourage or discourage" union membership. Virtually everyone remained employed, they received higher wages (at HSS' insistence and following negotiations between HSS and Remington), the employees continued to perform the same work in the same location, and they had the same supervisors. Nor is there any evidence that the outsourcing *caused* the housekeeping employees to be "encouraged or discouraged" in their union organizing efforts. *After* employees were informed that HSS was assuming responsibility for housekeeping, a representation petition was filed with the Board; a second representation petition was filed on September 11 (naming HSS and Remington as the employer), and amended petitions were filed on September 21 and October 16.

Second, the judge found, and I agree, that Remington remained a joint employer of the housekeeping employees following the outsourcing to HSS, based on Remington's continued supervision of those employees.[11] The fact that the HSS outsourcing did not discontinue Remington's legal status as an employer of the housekeeping employees further undermines the finding that the outsourcing constituted "discrimination" that tended to "encourage or discourage" union activities.[12]

Third, contrary to my colleagues' analysis of the outsourcing under *Wright Line*, I believe the record fails to support a finding that Remington had knowledge of un-

[9] 380 U.S. at 271 (emphasis added). Of course, an employer violates Sec. 8(a)(3) when it sets up a "runaway shop" by relocating or transferring work based on antiunion discrimination, or when it engages in subcontracting that displaces its own employees for unlawful reasons, see, e.g., *Darlington*, 380 U.S. at 272–273 & fns. 16 & 18, or when it engages in a discriminatory refusal to hire a predecessor's employees to defeat bargaining obligations associated with a potential successorship finding, see, e.g., *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992).

[10] Id. at 311 (emphasis added; citations omitted). See also *Darlington*, 380 U.S. at 276, where the Supreme Court stated: "We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect. . . . In an area which trenches so closely upon otherwise legitimate employer prerogatives, we consider the absence of Board findings on this score a fatal defect in its decision."

[11] The outsourcing in the instant case is materially different from that in *CNN America, Inc*.,361 NLRB No. 47 (2014), where I dissented from the majority's finding of joint-employer status, which they found notwithstanding CNN's 20-year history of utilizing technical personnel supplied by a contractor, during which the contractor and its predecessors (and not CNN) were recognized as the "employer," CNN did not employ any personnel tasked with supervising contractor employees, and the applicable services agreement explicitly made the contractor solely and absolutely responsible for "direction of the work force and other matters of personnel and labor relations." Id., slip op. at 30.

[12] The majority asserts that the employees would not have known that Remington would still have a duty to bargain if the employees selected a union. However, the Union's initial representation petition (Case 29–RC–087706) identified Remington as the employer, and the second representation petition (Case 29–RC–089045) listed both Remington and HSS as the employer, indicating that the Union knew that Remington would have to bargain with the Union if employees selected it as their representative. I believe it can reasonably be inferred that the Union would have communicated this fact to the employees as well.

ion activity *by employees* either on August 16, when it entered into the contract with HSS, or August 20, when it announced the outsourcing to the housekeeping employees. The judge found that a union organizer visited the hotel and communicated with "some of the housekeeping staff" beginning in April, but there is no evidence that Remington knew of these activities. The judge found that a union meeting had been planned for June 10, but this meeting was canceled. After June 10—the date by which the judge found Remington must have known "that a union agent was soliciting employees inside the hotel"—a handful of conversations about union activity took place between employees and Director of Housekeeping Andrew Arpino or Housekeeping Supervisor Percida Rosero, but there is no evidence that Arpino or Rosero knew or were advised that *any employee* supported the Union or engaged in union activity.[13] In the June 10 conversation between Arpino and employee Veronica Flores, Flores was asked if she "knew anything about a union," and Flores stated, "[S]he didn't know anything." Other record evidence likewise establishes that Remington management was advised that employees either lacked knowledge of or did not support the Union.[14] The Union did not receive signed authorization cards from any employees until July 4, which was after Remington and HSS had already exchanged phone calls and emails regarding potentially reinstating the HSS subcontracting arrangement.

Moreover, the Union's first representation petition was filed after Remington advised employees that it was subcontracting all housekeeping operations. According to the record and the judge's decision, the relevant events took place in the following order: (i) beginning June 18, Remington and HSS discussed reinstating the subcontracting of housekeeping operations; (ii) on August 16, Remington and HSS executed an agreement, with an effective date of August 21; (iii) on August 20, Remington announced the subcontract at a meeting with employees; and (iv) as the judge correctly found, "*[a]fter the [employee] meeting was held* on August 20, the Union filed its first representation petition on the same date" (emphasis added). Thus, the record fails to show that Remington had knowledge of any employee support for the Union or other employee union or other protected concerted activities prior to *either* August 16, when it entered into the outsourcing agreement with HSS, *or* August 20, when it announced the arrangement to employees.

Fourth, even assuming Remington suspected employee union activity when it entered into the subcontract with HSS, I believe the evidence does not support a finding that the subcontracting decision was motivated by antiunion considerations. Here, several uncontroverted facts, which my colleagues disregard or discount, warrant em-

[13] I agree that at least one of these conversations involved coercive interrogation in violation of Sec. 8(a)(1). However, it is an entirely different question whether the evidence reveals that Remington knew that any housekeeping employee supported the Union or engaged in union activities. My colleagues contend that Remington's interrogations demonstrate that it knew or at least suspected employees were engaging in union activity, citing *Kajima Engineering & Construction, Inc.,* 331 NLRB 1604 (2000). But in *Kajima*, the Board relied on evidence that the employer interrogated employees regarding how they would vote in an upcoming representation election to support a finding that the employer "harbored animus against the [u]nion." Id. at 1604. Obviously, the employer in *Kajima* already knew that its employees had engaged in union activity, since otherwise an election could not have been scheduled. Here, by contrast (and as detailed below), the first representation petition was filed *after* Remington contacted HSS to explore the possibility of outsourcing housekeeping, *after* Remington and HSS executed an outsourcing contract, and *after* Remington announced the outsourcing decision to the housekeeping employees. Moreover, simply as a matter of logic, asking questions cannot per se establish knowledge of what is asked about, since the usual purpose of asking questions is to learn something one does not already know. The cases cited by my colleagues do not hold otherwise, as the Board in each case did not find knowledge based solely on interrogations but rather relied on other circumstantial evidence as well. See *Hartman & Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc.*, 359 NLRB No. 100, slip op. at 2 (2013) (employer's knowledge of terminated employee's union activity inferred from circumstantial evidence, including, in addition to interrogation of employee, timing of termination, supervisor's "veiled reference" to employee's union activity, and employer's pretextual reasons for termination), incorporated by reference in 361 NLRB No. 59 (2014); *Evenflow Transportation, Inc.*, 358 NLRB 695, 697 (2012) (employer's knowledge of laid-off employees' union activity inferred from circumstantial evidence, including employer's interrogations and threats directed at laid-off employees and employer's pretextual reasons for layoffs), incorporated by reference in 361 NLRB No. 160 (2014); *McLean Roofing Co.*, 276 NLRB 830, 833 (1985) (interrogations showed employer "specifically suspected" discharged employees' involvement in union campaign where they occurred shortly after employer received union's request for recognition). In this case, there is no evidence Remington knew of any employee union activity, and Remington's questions were aimed at learning *whether* employees were engaging in union activity. For these reasons and the reasons described in the text, I believe the record fails to support a finding that Remington had such knowledge.

[14] Employee Ninfa Palacios testified that, in May, Supervisor Rosero asked about a "union meeting," and Palacios stated she knew "nothing" and "had not been invited to any meeting," although Rosero allegedly described "some rumors" about a meeting. Employee Flores testified that, in late June, Housekeeping Director Arpino showed her a photo and asked if the person was Jose Vega (a union organizer), and Flores "told Arpino that it was not him." On July 1, in response to HSS' June 30 email asking about unions at the property, Remington replied that union organizing "has been in play for many years and has also heated up in the past year"—but this reply is consistent with the judge's finding that "no later than June 10, 2012 . . . [management] was aware that *a union agent was soliciting employees* inside the hotel" (emphasis added). As indicated in the text, the judge made no finding that Remington had knowledge of employee support for the Union or union activities by employees prior to August 20, the date the Union's first petition was filed.

phasis. To begin with, housekeeping operations were *already* subcontracted to HSS when Remington took over management of the hotel. Although Remington decided to employ the housekeeping employees directly, it accomplished this *by hiring the housekeeping employees and their supervisors previously employed by HSS*. Moreover, its subsequent decision to reinstate the outsourcing arrangement was not unprecedented. Although Remington's usual practice has been to directly employ housekeeping personnel, it has subcontracted some functions in the past, including the housekeeping function. See judge's decision at fn. 2.

Significantly, the record contains customer satisfaction surveys for the Hauppauge, New York Hyatt over an extended period of time, and those surveys placed the hotel at or near the bottom of all full service Hyatt hotels.[15] No evidence contradicts Remington's explanation that the crux of the problem was turnover and an inability to secure enough housekeeping staff, and Remington's actions were consistent with the existence of these problems. Remington outsourced the housekeeping function to HSS in part because it believed HSS was in a better position to get sufficient staff for the hotel. Remington also acted consistently with its staffing concerns when it agreed, after extensive negotiations with HSS, to incur higher costs so that HSS could give the housekeeping employees substantial wage increases, with future new hires also to be paid at a higher rate than new hires were paid by Remington—increases that HSS believed were necessary to address Remington's staffing issues. The reasons articulated by Remington for the outsourcing of housekeeping operations to HSS are consistent with the nature, timing, and sequence of events, in addition to being similar to considerations that often result in subcontracting.[16] Contrary to the view expressed by my colleagues, I find no inconsistency between Remington's reliance on the low satisfaction survey scores as a justification for the subcontracting, and its belief that the low scores were unrelated to the quality of the housekeeping employees' work.[17] In my view, there is also no legal or factual support for the judge's statement that certain reasons cited by Remington Divisional Manager Sileshi Mengiste in support of the HSS subcontracting arrangement were "somewhat bogus."[18] Also, as noted previ-

[15] The judge discounted these survey scores because, first, Remington did not introduce evidence regarding "how these [low] scores compared to Hyatt's scores when it along with HSS ran the hotel and its housekeeping department before Remington took over," and second, "there was no evidence of any communications between Remington, Hyatt or the hotel's owners indicating . . . any concerns about the scores after Remington had taken over." In my view, whenever a company, such as Remington, assumes responsibility for managing a full service Hyatt hotel and is confronted with ongoing low customer satisfaction scores that place the hotel at or near the bottom of all full service Hyatt hotels, more evidence is not needed to establish credible justification for taking action, including the subcontracting implemented by Remington here.

[16] As to the timing and sequence of events, I disagree with my colleagues' argument that low customer satisfaction surveys for a period of 8 months after Remington took over the hotel's operation could not reasonably have prompted Remington to engage in the subcontracting. It is entirely plausible that a new hotel management company like Remington, after discontinuing its predecessor's outsourcing of housekeeping operations, would have waited 6 months before initiating a departure from its usual practice of directly employing housekeepers, and the record establishes that negotiations between Remington and HSS took approximately 2 additional months to complete.

[17] Remington's witnesses testified that the low scores were attributable to turnover issues and a problem getting enough housekeeping staff, and it was reasonable for Remington to believe that HSS, in the business of providing housekeeping staffing services, would have greater expertise and success dealing with these issues, particularly in conjunction with the substantial wage increases that HSS implemented. Moreover, the absence of quality problems was consistent with Remington's requirement that HSS hire Remington's existing housekeeping employees.

[18] See judge's decision at fn. 7. For example, the judge dismissed the suggestion in Mengiste's email, prepared the day that the Supreme Court decided *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), that the Supreme Court's ruling on the Affordable Care Act might expose the hotel to increased healthcare expenditures in the future. The judge discounted this statement because (he reasoned) the Affordable Care Act (ACA) was not going to be effective "for at least a year and would not really affect an employer that already was providing health insurance to its employees." One need not reconcile the divergent views that exist regarding the ACA to recognize that the judge's analysis here is simply wrong: as of June 2012, countless employers—including those that already provided health insurance coverage—had profound concerns about the ACA's impact on future cost increases. See, e.g., "Rachel Maddow, Ed Meese and others react to the health care ruling," The Washington Post (June 29, 2012) (Karen Ignagni, President of America's Health Insurance Plans, quoted as stating that the "cumulative effect of [ACA] provisions will result in higher costs and coverage disruptions," and "[w]e must also address the unsustainable rise in medical costs that are burdening families and employers"). http://www.washingtonpost.com/opinions/topic-a-parsing-the-supreme-courts-ruling-on-health-care/2012/06/28/gJQAGwNN9V_story.html (last visited May 1, 2015). Similarly, as described by the judge, Mengiste believed subcontracting could permit Remington to "lower costs because a contractor might be able to lower wage rates and because various of the existing employee costs . . . would be carried by HSS instead of Remington" (judge's decision at fn. 7). The judge regarded such reasoning as "naïve" because, in his view, it was a certainty that HSS "would take on these costs" and would then "negotiate a contract . . . setting a price to offset the costs and earn a profit." This criticism fails to acknowledge that countless instances of subcontracting result from an expectation that a contractor, for several reasons (e.g., specialized expertise, economies of scale, experience), can provide services at a lower cost than that incurred by the contracting employer. Indeed, in *Fibreboard*—the leading Supreme Court case addressing employer bargaining obligations involving subcontracting—this was precisely the rationale that prompted the employer to contract out its maintenance work. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 206–207 (1964) (the contractor "assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed," notwith-

ously, the subcontracting to HSS appears to have been terribly ill-suited to discourage housekeeping employees from supporting a union because Remington required HSS to hire *all* Remington housekeeping employees (subject only to conventional pre-employment requirements imposed by HSS that no evidence suggests were attributable to unlawful antiunion discrimination).

As noted above, I agree that the Respondent violated the Act based on its discriminatory failure to hire HSS' employees when HSS *terminated* the subcontracting arrangement effective October 19. However, I believe the record fails to support a finding that Remington's reinstatement of outsourcing to HSS constituted "discrimination" that tended to "encourage or discourage" union membership, which is a prerequisite to any violation of Section 8(a)(3). Nor do I believe the record establishes that Remington had knowledge of employee support for the Union or of other protected concerted activities by employees as of August 16, when Remington entered into the outsourcing agreement with HSS, or August 20, when it announced the outsourcing to employees. Finally, in my view, the evidence does not permit the General Counsel to satisfy his burden of proving that antiunion considerations were a motivating factor responsible for Remington's outsourcing of housekeeping operations. And even if Respondent had mixed motives, I believe the facts—especially Remington's insistence that HSS retain Remington's housekeeping employees, and the legitimate reasons articulated by Remington for outsourcing the housekeeping function to HSS—warrant a finding that Remington would have subcontracted the housekeeping function to HSS without regard to union considerations.[19]

2. *Remington's Discharge of Margaret Loiacono Did Not Violate the Act*. Unrelated to the outsourcing of housekeeping operations, Remington employed a probationary employee, Margaret Loiacono, as a "lobby ambassador." Her job duties required her to be present in the hotel lobby during periods of high guest checkout, answering guests' questions and helping to solve their problems. On December 30, 2012, during a peak checkout period, Loiacono left the lobby for approximately 10–15 minutes to complain to a supervisor about inaccuracies in a "pie chart" she had received from Remington, which purported to depict how her compensation was allocated. Loiacono complained to Yohenna Borrero, a housekeeping supervisor, that her pie chart incorrectly allocated a certain amount to a "uniform allowance," since Loiacono did not wear a uniform. Also on December 30, Loiacono had a similar conversation about the pie chart with General Manager Jeff Rostek, during which she stated she had been a member of a New York State employees' union. On December 31, Rostek received an email from Supervisor Borrero, which stated, among other things, that Loiacono "was calculating . . . all of the money since she started working here that she should get for the dry cleaning" (referring to the uniform allowance) and that Loiacono stated, "[T]hat is not legal, putting things that they are not getting and lying to the people and that was against the law."

As Loiacono was approaching the end of her probationary period, Remington had to decide whether or not to continue her employment. Based in part on other concerns, but specifically referencing Loiacono's absence from the lobby on December 30 while complaining to Borrero, Remington decided to terminate Loiacono's employment. The judge correctly noted that Loiacono's "complaint" about the pie chart, "as described by her own testimony," was "not really a complaint about her actual compensation," nor was Loiacono "speaking on

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standing the Company's responsibility to cover "the costs of the operation plus a fixed fee of $2,250 per month").

[19] My colleagues attach weight to a comment by Housekeeping Supervisor Rosero—absent any evidence that Rosero was involved in Remington's subcontracting decision—who allegedly stated that the subcontracting occurred because of the Union, and the majority cites *TCB Systems, Inc.*, 355 NLRB 883, 885 (2010), enfd. mem. 448 Fed. Appx. 993 (11th Cir. 2011), for the proposition that it is reasonable to infer that a supervisor knows the reason for an adverse action even if not personally involved. However, in *TCB Systems*, there *was* an adverse action. There, when a new employer won a contract to clean buildings, the contractor *refused to hire* several of the most vigorous union supporters, and the supervisor named those discriminatees and said they had been fired because they showed strong support for the union. Here, by contrast, *there was no adverse action*. Remington required HSS to hire its housekeeping employees (and all but a handful who failed to pass HSS' lawful pre-employment screening were in fact hired), and those employees continued performing housekeeping services at the hotel throughout the duration of the subcontract—at higher wages than before.

For reasons similar to those expressed above, I believe the remedy devised by the judge and approved by my colleagues for the subcontracting of housekeeping operations to HSS is inappropriate. Having found, erroneously, that Remington "illegally made a decision to contract out the housekeeping department to HSS," the judge concluded that "*given the chain of causation*, Remington is *legally responsible for what happens to those employees thereafter*" (emphasis added). Based on that conclusion, the judge ordered reinstatement and backpay absent "any other legal impediment," not only for those HSS employees whose employment terminated on or about October 19 (when Remington unlawfully refused to hire the housekeeping employees when the HSS subcontract ended), but also "to the extent that some of the [Remington] employees were not hired by HSS." Under this "chain of causation" analysis, the judge imposes liability on Remington as to employees HSS declined to hire for lawful reasons (e.g., failure to pass a drug test, lack of work authorization), without any evidence that Remington discriminated against them based on their union support. To the extent that HSS declined to hire certain employees for reasons unrelated to antiunion discrimination, the absence of such discrimination is a "fatal defect" in the judge's remedy. *Darlington*, 380 U.S. at 276.

behalf of other employees." Nonetheless, the judge found that Loiacono's discharge violated Section 8(a)(1) of the Act, based on the following reasoning:

> As of December 2012, the election petition was still pending before the Board's Regional office. And the pie charts that were distributed to the employees were part and parcel of the Respondent's campaign to convince employees to vote against the Union. In these circumstances, it seems to me that the Respondent's view of Loiacono's reported extravagant reaction to the pie charts *could likely have led management to view her as a potential thorn in the side* when it came to other campaign literature that it intended to issue as an election drew nearer. (As noted, Loiacono had told Rostek that she had been a member of a New York State employee union.)
>
> Even though *Loiacono did not join or support the Union or engage in concerted activity with other employees*, I cannot escape the conclusion that it is more probable than not that the Respondent's management *viewed her as a potential obstacle in relation to their own election campaign propaganda*. Accordingly, I conclude that by discharging Loiacono, the Respondent violated Section 8(a)(1) of the Act.[20]

When determining whether Loiacono's discharge violated Section 8(a)(1), one must first examine Section 8(a)(1) itself, which makes it unlawful for an employer to "interfere with, restrain, or coerce" an employee "in the *exercise of the rights guaranteed in section 7*" (emphasis added). Thus, the threshold question is whether Loiacono was exercising "rights guaranteed in section 7."

The Board has dealt extensively with whether activities by a single employee involve "exercise of the rights guaranteed in section 7." In relevant part, Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the *purpose* of collective bargaining or *other mutual aid or protection*.

The Board has held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in *with or on the authority of other employees*, and *not* solely by and on behalf of the employee himself."[21] It has also held that a single employee's efforts to induce group action may constitute concerted activity, but only where the conversation "'was engaged in with the object of initiating or inducing or preparing for group action or . . . had some relation to group action in the interest of employees.'"[22] And even if two or more employees engage in "concerted" activity, it is not protected by Section 7 unless there is a "purpose" that relates to "mutual aid or protection."[23]

In the instant case, the judge correctly found that Loiacono did not engage in protected concerted activity, and this precludes a finding that Loiacono's discharge violated Section 8(a)(1). The record also reveals that Remington had likewise discharged another probationary employee for a similar performance failure, and there is no evidence that Remington regarded Loiacono as a union supporter (she had advised General Manager Rostek that "she was not for the Union or against it, but . . . she would probably be a non-union employee"). Nevertheless, my colleagues find "the record supports an inference that the Respondent believed that Loiacono would speak out against the Respondent's position in the campaign and would incite others to do the same." I respectfully disagree.

The record reveals that Loiacono did not exercise "rights guaranteed in section 7" and did fall short in the performance of her duties during her probationary period. Even if her absence from the hotel lobby at a critical time does not wholly account for her discharge, Remington at most believed Loiacono would be a difficult employee with a poor attitude—to use the judge's phrase, a "potential thorn in the side." It does not violate the Act for an employer, rightly or wrongly, to terminate an employee based on its assessment that the employee might be undependable, unpleasant, or annoying.

The cases relied upon by my colleagues to find Loiacono's discharge unlawful are distinguishable from the instant case. In *Dayton Hudson Department Store Co*., 324 NLRB 33 (1997), the employer terminated an

[20] Emphasis added.

[21] *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*) (emphasis added), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[22] *Meyers II*, 281 NLRB at 887 (quoting *Mushroom Transportation Co., Inc. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964)).

[23] Sec. 7. See generally *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 13 (2014) (Member Miscimarra, concurring in part and dissenting in part).

employee because she had performed an act in the course of her regular work duties—processing a coworker's transfer request—that the employer believed would instigate renewed union activity. The employer admitted that the employee "did what she was supposed to do," but it discharged her based on its belief that her act would "get the union brewing again." 324 NLRB at 34. Here, Loiacono was *not* doing what she was supposed to do—greet and assist guests in the hotel lobby—and there is no evidence that Remington believed Loiacono had done anything that assisted the Union. In *Monarch Water Systems, Inc.*, 271 NLRB 558 (1984), the employer discharged an employee who participated in a Department of Labor compliance investigation because the employer believed the employee had worked together with a former employee to instigate the investigation. In *Parexel International, LLC*, 356 NLRB 516 (2011), the employer had heard that an employee had complained about a perceived pay disparity, and it met with her to determine whether she had discussed the matter with other employees. Determining that she had not, the employer discharged her, and the Board concluded that she was unlawfully discharged to prevent those conversations from taking place.[24] In the instant case, there is no evidence that Remington either believed Loiacono had engaged in protected concerted activity (as the judge found, she had not) or feared that she would engage in such activity. At most, Remington was concerned that Loiacono would be difficult and hypertechnical as an *individual* employee. Such a concern about a single employee's individual conduct is not elevated to an 8(a)(1) violation merely because *other* employees were engaged in union organizing activities at the time.

Accordingly, I concur with my colleagues' finding that Remington violated Section 8(a)(1) by coercively interrogating and threatening employees, and Section 8(a)(3) and (1) when it terminated the employment of all HSS housekeeping employees effective October 19, 2012. However, I respectfully dissent from their findings that Remington violated Section 8(a)(3) when it subcontracted the housekeeping operations to HSS and terminated the employment of Margaret Loiacono.

Dated, Washington, D.C. February 12, 2016

Philip A. Miscimarra, Member

[24] I have rejected the "preemptive strike" (preemptive restraint) theory of *Parexel*—i.e., basing an 8(a)(1) violation finding on an employer's purported motive to prevent *future* concerted activity, absent any evidence that any employee has sought to initiate, induce, or prepare for group action—as contrary to the holdings of *Meyers II* and *Mushroom Transportation*. See *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 8 (2014) (Member Miscimarra, dissenting in part). I adhere to that view.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT contract out work and discharge or refuse to hire you because of your actual or perceived membership or activities in Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades, or discourage you from engaging in union or protected concerted activity.

WE WILL NOT refuse to hire you because of your union or protected concerted activities.

WE WILL NOT coercively question you about your union or protected concerted activities.

WE WILL NOT tell you that we would more strictly enforce workplace rules if a union is selected as your bargaining representative.

WE WILL NOT threaten you with discharge or other reprisals if you choose to be represented by a union.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer the housekeeping employees employed at the Hyatt hotel in Hauppauge, New York, as of August 20, 2012, full reinstatement to their former jobs, or if

those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer the housekeeping employees employed at the Hyatt hotel in Hauppauge, New York, as of October 19, 2012, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Margaret Loiacono full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-described employees whole for any loss of earnings and other benefits resulting from discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate the employees for the adverse income tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and refusals to hire, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and refusals to hire will not be used against them in any way.

REMINGTON LODGING & HOSPITALITY, LLC

The Board's decision can be found at www.nlrb.gov/case/29-CA-093850 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Brent Childerhose, Esq., Ashok Bokde, Esq., and *Lara Haddad, Esq.,* for the General Counsel.
Karl M. Terrell, Esq., for Remington.
Jonathan J. Spitz, Esq., for HSS.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on various days from March 6 to 20, 2013. The charge was filed on November 27, 2012, and the complaint was issued on January 15, 2013.[1] In substance, the complaint alleges as follows:

1. That in or about mid-June 2012, Remington, by Andrew Arpino, at the time the housekeeping manager, interrogated employees about their union activities.

2. That in August and September 2012, Remington by Percida Rosero, a housekeeping supervisor (a) threatened employees with discharge; (b) threatened employees regarding their immigration status; (c) interrogated employees about their union activity; and (d) told employees that their work was being subcontracted to avoid the Union.

3. That in August and September 2012, the Respondent by Osiris Arango, the human resources director (a) interrogated employees about their union activities; (b) directed employees to report union activity; (c) told employees that work was being subcontracted to avoid the Union; (d) directed employees not to sign union authorization cards; and (e) threatened employees with discharge.

4. That from August 21 to October 19, 2012, Remington for discriminatory reasons subcontracted the housekeeping work at the Hyatt Hotel to HHS.

5. That on or about October 19, 2012, Remington, for discriminatory reasons discharged about 37 housekeeping employees, some of whose names are unknown and including the following named employee:

Maria Armay	Vilma Barzallo
Andre Bonard	Estela Cabrera
Maria Garcia	Berty Gandados
Noris Gutierrez	Francis Lopez
Efer Monge	Ninfa Palacios
Roxana Pereria	Ana Salgado

6. That alternatively, from about September 19, 2012, to October 19, 2012, Remington for discriminatory reasons refused to hire or consider for hire, the housekeeping employees who were directly employed by HHS and are described in the preceding paragraph.

[1] At the hearing, Hospitality Staffing Solutions (HSS) offered to fully settle the case to the extent that the complaint alleged that it engaged in or was responsible for unlawful conduct. The General Counsels asserted that they were not alleging that HSS would be liable for any backpay resulting from a finding of illegal discrimination and that there were no prior instances where HSS had been found to have violated the National Labor Relations Act (the Act). Accordingly, as HSS agreed to fully remedy all of the allegations that were attributable to it, and as the Charging Party also agreed to enter into the settlement, I approved the settlement on March 19, 2013, over the objection of the General Counsel.

7. That on or about January 2, 2013, the Respondent for discriminatory reasons discharged Margaret Loiacono.

8. That in January 2013, the Respondent distributed literature to employees that (a) threatened employees with more onerous working conditions; (b) threatened employees with unspecified reprisals; and (c) threatened to withhold a benefit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondents admit and I find that they are employers engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Nature of the Operations

The facility involved in this case is a hotel located in Hauppauge, New York. Although branded as a Hyatt hotel, it is not owned by that entity, which instead leases its brand to a group of independent owners. For many years, the hotel utilized the Hyatt organization to provide the actual management services for the hotel. Hyatt in turn, subcontracted out the housekeeping department, consisting of about 40 employees, to a company called Hospitality Staffing Services (HSS). HSS is based in Atlanta, Georgia, and provides staffing services specifically for hotels throughout the country. At the time that it was performing the housekeeping functions for this particular hotel, HSS had an office in Long Island and this hotel was its only customer on the Island.

In 2011, the owners of the hotel decided that they no longer wished to use Hyatt to run the hotel and contracted this function to Remington Lodging & Hospitality, LLC. This company has its main headquarters in Dallas, Texas, and currently manages 70 hotels in the United States.

The president of Remington is Mark Sharkey. Under him is Evan Studer who is the executive vice president of operations. In turn, there are about 15 divisional managers who report to Studer, including Sileshi Mengiste who is responsible for a number of hotels including the Hyatt in Hauppauge. When Remington, in December 2011, took over the running of the hotel, the local general manager was Michael Lawrence. He left in 2012 and after a short period when there was an interim general manager; Jeff Rostek took over this position in or about the middle to late July 2012. At one point, Mark Arpino was the head of housekeeping, but he was moved to be the front desk manager and his position was taken by Blanca Dunleavy on August 1, 2012. In the housekeeping department there were two supervisors who reported to Dunleavy and these were Percido Rosero and Yohenna Borrero. The Respondent concedes that these two individuals are supervisors as defined in Section 2(11) of the Act. At the corporate level, Remington employs a director of human resources who is Sharon Glees. At the local level, the director of human resources for this particular hotel is Osiris Arango.

In December 2011, when Remington took over the management of the hotel, it decided that it would directly employ the hotel's employees including the employees in the housekeeping department. Accordingly, the arrangement with HSS was canceled and the housekeeping employees, including their supervisors, were hired by Remington. This decision was in fact consistent with Remington's general preference which is to directly employ hotel staff so that it can have more control over the hotel's operations.[2]

So, from the time that Remington took over the management of the hotel and until August 20, 2012, it directly employed the housekeeping staff and supervisors who worked under the direction first of Mark Arpino and then of Blanca Dunleavy.

Before moving on, I note that hotels are generally rated in various categories based on guest surveys that are conducted either by the brand (e.g., Hyatt) or by an independent entity. In this respect, customers are sent, usually by email, surveys in which they can rate various aspects of the hotel, such as service, cleanliness, etc. Although not every guest will respond, sufficient guests do respond and a rolling tally is sent to each hotel and their respective managements. For our purposes, the main category we should be concerned with is the survey results for guest rooms. According to the Respondent's witnesses, a reason that the hotel's owners decided to contract with Remington was because the survey scores under Hyatt and HSS were unacceptable. They also testified that after Remington took over, the scores continued to place this hotel at or near the bottom of all full service Hyatt hotels. It is Remington's contention that when the scores for the hotel did not improve, it decided that the remedy should be to outsource the housekeeping work to another company. And to this end, the record indicates that a decision to explore the possibility of contracting out this work was initiated sometime in mid- to late June and no later than June 28, 2012.

B. Commencement of Union Organizing and the Decision to Subcontract Housekeeping Operations

Jose Vega, a union agent, visited the hotel in April and while there started to communicate with some of the housekeeping staff about unionization. Thereafter, he made a habit of visiting the hotel and during the course of his visits from April, he met with an employee named Veronica Flores who became his liaison with the other employees. As a result, a union meeting was planned for some time June 10, 2012. However, that meeting was called off because, Vega was told by Flores that management had learned of the union activity.[3]

[2] Although there have been occasions in the past when Remington has subcontracted various functions to other companies, there are far fewer instances when Remington has contracted out housekeeping functions. There are some exceptions, but by and large, except for one past instance involving a hotel in Key West, Remington never contracts out *all* of the housekeeping work. Either it will directly employ the employees or subcontract for only a supplemental staff. In the case of the Key West Hotel, the housekeeping work was contracted out for only a limited period of time and was later brought back in-house.

[3] I am not relying either on Vega's testimony or the testimony of employees that the meeting was canceled because employees believed management knew of union activities to prove the truth of that assertion.

Ninfa Palacios, a housekeeping employee, testified that sometime in May 2012, she was approached by Supervisor Percida Rosero who asked her if she was asked to participate in a union meeting. Palacios testified that she told Rosero that she new nothing and had not been invited to any meeting. She states that Rosero said that there were some rumors that a meeting was going on.

Veronica Flores testified that in June 2012, Andrew Arpino, then the director of housekeeping, called her into his office and asked if she knew anything about a union. She testified that she said that she didn't know anything and that he said that if she heard anything, she should let him know. Flores states that when she asked him what was going on, Arpino showed her a union business card and said that another employee named Amaya, had given it to him.[4] In relation to this meeting, Flores was not all that certain as to when it occurred but from the context of her testimony it most likely occurred shortly before June 10. She also testified that no one else was present. According to Flores, it was after this meeting that she contacted Vega and asked that the meeting be called off.

Flores testified that in late June, she had another conversation with Arpino and that while in his office, he showed her a picture on a computer screen and asked if the person was Jose Vega. She testified that although it looked like Vega, it was not him and that she told Arpino that it was not him.

Flores testified that in early July, she was approached by Rosero who said that the Union was trying to get into the hotel that this was impossible because it would take money away from everyone and that a union would not work with someone who is not documented.

Finally, Flores testified that in early August, she overheard Rosero talking to another employee and that Rosero said that employees would be dismissed if they talked to the Union and that the Union did not work with people who were undocumented,

The Respondent did not call Arpino or Rosero as witnesses and they therefore did not contradict the testimony of Flores or Palacios. Accordingly, I shall credit their testimony which shows that by no later than June 10, 2012, management was aware that a union agent was soliciting employees inside the hotel.

In my opinion, the above-noted conversations constituted illegal interrogations under the rationale of *Rossmore House*, 269 NLRB 1176 (1984). I also conclude that the statements overheard by Flores that Rosero made in August, constituted an impermissible threat of reprisal in violation of Section 8(a)(1) of the Act.

Although the record is not clear as to exactly when the Respondent commenced the process resulting in the subcontracting of the housekeeping work, the first written communi-cation regarding this subject is dated June 28, 2012. On this date, Sileshi Mengiste, sent two similar email reports to Mark Sharkey (the CEO), Evan Studer (the executive vice president of operations), and Sharon Glees (the head of human resources). The report sent at 8:39 p.m., which slightly modifies a report sent at 3:51 p.m., states:

> Dear Mark
>
> As you aware, the hotel made the decision sometime ago to bring the outsourced housekeeping department in house in order to improve guest satisfaction and operations scores. This approach has not delivered the expected results as our scores are still a major problem for this hotel.
>
> In order to improve the hotel's financial position and flow through, as well as to improve operational efficiencies, I recommend that we again outsource the housekeeping department to Hospitality Staff Solutions (HSS), a reputable contract labor company that the hotel has worked with on a limited basis since 2008.
>
> Additional benefits to outsourcing the department follow:
>
> Financial—Attached is an analysis computed with the current contract rate of $12.60 per hour. This represents a "worst case" scenario and I will be working on a reduced rate considering the amount of business we will be bringing to HSS.
>
> Workers Compensation—HSS will carry all liability insurance, which will reduce a significant amount of financial burden and responsibility from the hotel operations.
>
> Healthcare—Considering the Supreme Court's ruling today on the Affordable Healthcare Act, the hotel's exposure to increase healthcare expenditures in the future is uncertain at best and more likely represents a significant increase financial burden on the hotel operations.
>
> Hiring and Recruiting—Currently, the hotel is struggling to fill open positions in the housekeeping department. On average, it will take 30 to 45 days to hire a house person or a room attendant. HSS has vast resource as and expertise to meet our staffing needs.
>
> Over time—Currently the hotel incurs overtime if business demand increases on short notice, staff calls out sick or our forecasting proves to be inaccurate. HSS had the resources to readily provide the necessary staffing levels on short notice in order to meet business demands.

On the same day at 9:02 in the evening, CEO Mark Sharkey responded to the emails and stated:

> Sileshi, I have reviewed your email and agree that it is time to address this problem. We cannot allow service to be this low or to continue to suffer from staffing problems. This has gone on too long and we must make a change immediately. Reach out to HSS and make the necessary changes tomorrow. Do what you can to get HSS to lower their hourly rate or to tie the rate to a level of service, etc. Ps get this done before the weekend. Thanks.

According to Rick Holliday, his company was first contacted by Remington on June 28. In this regard, Holliday testified that he checked his records and confirmed that this was when Sileshi Mengiste contacted HSS' business development team.

Holliday testified that in late June or early July, he participated in a conference call with Mengiste, Studer, and Glees

[4] Vega testified that on his visits to the hotel, he would walk around the hallways and when he spoke to an employee would hand out his business card.

who said that they needed to move in this redirection because of low survey scores and because they were having some turnover issues. He states that they told him that they were having a problem getting enough housekeeping staff. Holliday also testified that they told him that they wanted this to happen right away: "the next day."

On June 30, 2012, Rick Holliday sent an email to Remington which stated:

> I apologize for not getting back to you sooner. We are working on determining the time frame to be able to re-open the branch office back up.
>
> Sharon, are there any issues with unions, ICE or wage and hour at the property now?

On July 1, 2012, Evan Studer of Remington, sent a message to Holliday which stated inter alia:

> To my knowledge there are no issues with the items you noted. I'm sure you're aware that union organizing on the island has been in play for many years and has also heated up in the past year, something to be aware of. Our objective is to get this department outsourced for all the reasons we reviewed with you, such as better recruiting pool, keeping our cost at or near to its current level and the primary reason to quickly grow our guest satisfaction rating in the Hyatt system. Our research has led us to believe all these items can be best served in this market through a professional nationwide cleaning organization.

From July 2 to 9, Studer also communicated with David Tucker from a company called Jani-King about a possible contract. On July 2, Tucker sent an email to Studer attaching a proposed contract. At 5:59 p.m., Studer acknowledgement receipt of the contract and in a response, with copies to Sharon Glees and Sileshi Mengiste, he stated: "We will review tonight and be back in the contact with you tomorrow morning. Our intent is to still move forward with an outsourced service." However, in the end, Remington decided to use HSS instead of Jani-King because the quoted price was too high and Studer found out that what Jani-King did was to further subcontract to yet another local company.

On July 4, Vega had a meeting with a number of Remington employees and managed to obtain four signed authorization cards. The evidence shows that from July 5 to 11, the Union obtained seven other signed authorization cards.

At some point before July 12, Holliday visited the hotel and on July 12, he submitted a contract proposal to Remington. Between July 12 and 16, HSS and Remington by their respective agents, engaged in extensive negotiations regarding the subcontracting of the housekeeping department. The major issues were that HSS was insistent that the wages and compensation currently paid by Remington were not high enough to attract suitable and sufficient employee applicants. And the other major issue was that HSS was insisting on and Remington was resisting, a provision whereby if the contract was terminated, Remington would not solicit any employees of HSS and would, as a remedy, pay to HSS, a substantial amount of money in the event that Remington hired HSS employees after a contract had been terminated.

On August 16, 2012, a contract was executed between Remington and HSS and the start date was scheduled for August 21. In essence, the agreement called for the transfer of Remington's housekeeping employees to HSS; a new and higher starting pay rate; a raise for already employed employees; and a penalty clause whereby Remington would pay a half year's wage for any HSS housekeeping employee that Remington hired in the event that the contract was terminated. The housekeeping director and two housekeeping supervisors would remain employed by Remington and HSS agreed to hire at least one new supervisor.[5]

On August 20, the employees of Remington were told that HSS was taking over the housekeeping functions and that if they wished to be hired by HSS, they should fill out applications. Most did so and most were hired. However, there were a few whose information was questioned by HSS' E-Verify system and who did not get employed by HSS.[6] Those that were hired by HSS began on its payroll as of August 21, 2012. They also got substantial wage increases. Those hired after August 21, were paid at a higher rate than new hires were paid by Remington.

After the meeting was held on August 20, the Union filed its first representation petition on the same date. (Case 29–RC–087706.) This petition sought to have an election amongst the housekeeping employees who were employed at the Hyatt hotel. Presumably, this petition was received by the company on August 21. It later was withdrawn and replaced by another petition.

It should be noted that in addition to the sudden quest to contract out the housekeeping duties, it is conceded that Remington's cost for utilizing HSS to perform this function was higher than Remington's existing costs.[7] I also note that there was no

[5] Except for one former employee of Remington, HSS agreed to hire all of Remington's employees who passed a drug screen, a background check, and the Company's E-Verify system.

[6] Without going into too much detail, employers can voluntarily enroll in a Federal Government system called E-Verify. Under this system, a company can, after obtaining certain documents from a new employee (often social security cards), utilize this computer system to check to see, for example, if a new hire's social security number is a match to one on file with Social Security. If there is nonmatch, the newly hired employee is given a fixed period of time to contact the government agency and fix the problem. If it can't be fixed or explained (for example a nonmatch because of a name change), then the employee has to be fired.

[7] Some of the considerations cited in favor of contracting out the work set forth in Mengiste's June 28 memorandum, strike me as being somewhat bogus. For one thing, he cites the Supreme Court decision on health care, which would not go into effect for at least a year and would not really affect an employer that already was providing health insurance to its employees. In part, Mengiste claims that by contracting out the work, Remington would likely be able to lower costs because a contractor might be able to lower wage rates and because various of the existing employee costs, such as worker's compensation insurance and health insurance, would be carried by HSS instead of Remington. But the people who run HSS have ample experience in hotel staffing and I don't see how Mengiste would be so naïve as to assume that HSS would negotiate a contract where it would take on those costs without setting a price to offset the costs and earn a profit. Indeed, as the negotiations got underway, it became obvious that hiring HSS to do the

issue about the quality of the Remington housekeeping staff. It was acknowledged by Remington that the reason why the quality scores were not good was not because the employees were lazy or incompetent, but rather because Remington simply could not employ enough workers to get the job done right. Thus, Remington's management asserts that they thought that because HSS specialized in manpower recruitment, it would be in a better position to get sufficient staff for this hotel. But it seems that the problem was not so much HSS' recruitment skills as the amount of money that Remington was offering to work at this hotel. Indeed, HSS after having its contract for this hotel terminated back in December 2011, had no office in Long Island, had no staff for Long Island, and had no contacts with the local labor market in that area. Moreover, if HSS had not been successful before December 2012, why would Remington assume that HSS would be more successful now?

Remington asserts that the main reason that it decided to contract out this work to HSS was because the customer service scores were and remained low. However, I note that although the Respondent put into evidence those scores over an extended period of time, there is no evidence showing how these scores compared to Hyatt's scores when it along with HSS ran the hotel and its housekeeping department before Remington took over. Moreover, and more significantly, there was no evidence of any communications between Remington, Hyatt, or the hotel's owners indicating that either Hyatt or the owners were worried or had any concerns about the scores after Remington had taken over. Indeed, there is no evidence of any communications by Remington's management to either Hyatt or to the hotel's owners that Remington was concerned about the scores or that it was even contemplating any measures to improve the scores.

The General Counsel contends that the decision to subcontract out the work of the housekeeping employees was so that Remington could avoid being their employer and therefore avoid having to bargain with a union. Since this is alleged to be violative of Section 8(a)(3) of the Act, the legal standard would be the one set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In my opinion, the facts cited above, including the evidence that the decision to subcontract was undertaken shortly after management became aware of union activity at the hotel, strongly support a primae facie showing that the decision was motivated by antiunion considerations. *Best Plumbing Supply, Inc.,* 310 NLRB 143, 144 (1993); *Flat Rate Moving, Ltd*., 357 NLRB 1321, 1328 (2011), affd. by 2d Cir. on November 21, 2012; *Evenflow Transportation, Inc*., 358 NLRB 695 (2012). As it is also my opinion that Remington has not met its burden of proof to show that it would have taken this action notwithstanding the employees' union activity, I also conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act.

housekeeping work would substantially increase Remington's costs and not reduce them. In fact, it strikes me that the only rational way to justify this kind of cost increase, would be because Remington could off load not the costs, but the employees to someone else so that it could avoid being required to bargain with a union.

Having concluded that Remington illegally made a decision to contract out the housekeeping department to HSS, I conclude that given the chain of causation, Remington is legally responsible for what happens to those employees thereafter. Thus, the decision to contract out the housekeeping department resulted in the discharge of those employees from Remington's employment. Accordingly, to the extent that some of the employees were not hired by HSS, those particular employees, absent any other legal impediment, would be entitled to reinstatement and backpay from August 20, 2012, to such time as they receive an unconditional offer of reinstatement. As to those former Remington employees who were hired by HSS, they also would be entitled to reinstatement by Remington after their discharge by HSS on or before October 19, 2012. In these circumstances, their employment at HSS should be considered as interim employment for purposes of calculating backpay owed by Remington. Therefore, any Remington employees who were hired by HSS and who had their employment terminated for any reason other than gross misconduct would be entitled to backpay starting from the date of their termination to such time as they receive unconditional offers of reinstatement.

As noted above, HSS commenced operating at the hotel on August 21, 2012, and hired almost all of the housekeeping employees of Remington. Nevertheless, the housekeeping director, Bianca Dunleavy, and the two housekeeping supervisors remained employees of Remington. Thus, although the regular employees were on the payroll of HSS, they continued to be supervised by Remington.

C. Continued Union Organizing Activity and the Termination of the Contract between Remington and HSS

By the time of the transfer, the Union had obtained a total of 25 signed authorization cards from employees. After August 21, 2012, the Union continued to solicit authorization cards during the months of August through November and obtained an additional 30 cards during that period of time. (Most were obtained in August and October.) Thus, the transfer of the employees from Remington to HSS did not stop employees from seeking representation.

On September 11, 2012, the Union filed a new petition in Case 29–RC–089045 for a unit of about 40 housekeepers, housemen, maintenance, and drivers. The petition lists both Remington and HSS as the employers. This was amended on September 21, 2012, and amended again on October 16, 2012. The final amendment lists only Remington as the employer (deleting HSS), and sought to have an election in a wall-to-wall unit consisting of 120 employees.

HSS continued to perform services at the hotel until October 19, 2012. In this regard, the record shows that this was HSS' only client in Long Island and that although it had attempted to interest Marriott in using its services for this area, those solicitations were unsuccessful and occurred before HSS entered into the contract with Remington.

The record shows that during August and September, there were a number of written communications between Remington and HSS whereby Remington complained about a number of

issues including the level of staffing; the nonhiring by HSS of a supervisor; the mispayment of wages; and the lack of a trainer.

On September 19, 2012, Holliday sent a memorandum to Studer which stated:

> Per our contract, this letter serves as 30 days notice to terminate our agreement with Remington Hotels . . . effective October 19, 2012. As a courtesy, we waive section 9 of our services agreement and have no objection to Remington soliciting and hiring HSS employees currently employed at the property.

Holliday not only stated that HSS was going to terminate the contract, but that it would *not* enforce the penalty clause that would otherwise require Remington to pay the equivalent of 6 month's pay for each HSS employee that Remington decided to reemploy at the hotel. Holliday explained that he waived section 9 because HSS had no other locations in the area, and therefore had nowhere to put these people anyway.

At some point before October 19, 2012, Remington went out and recruited an entirely new housekeeping staff and trained them at another hotel. Thus, when October 19 arrived, all of the housekeeping employees who worked at the hotel were told (to surprise of the HSS management), that they were being fired and that they would not be hired back by Remington. In justification of this action, Remington witnesses testified that although HSS had waived the penalty clause, they couldn't be sure that HSS wouldn't try to have these employees work elsewhere and that Remington could not be sure if it would have an adequate staff available when it resumed control of the housekeeping operations. To me this is absurd. For one thing, HSS had no other place to put these people and in my opinion, Remington was aware that HSS had not been successful in soliciting other business in Long Island. For another thing, it would have been a simple matter to ask the employees, after HSS had given its termination notice, if they wished to be reemployed by Remington. It had a month to do so.

Based on the above, I am convinced that Remington chose not to hire the housekeeping employees because of their continued union activities and to avoid a possible adverse consequence resulting from the pending election petition. See *FES, a Division of Thermo Power,* 331NLRB 9 (2001), supplemented at 333 NLRB 66 (2011), enfd. 301 F.3d 83 (3d Cir. 2002), explicating the legal framework for deciding cases involving alleged discriminatory refusals to hire. I therefore conclude that by refusing to offer these employees their jobs back, Remington violated Section 8(a)(1) and (3) of the Act.[8] Also, as I have already concluded that the prior discharge of the housekeeping employees on August 20, was a violation of the Act, it is not necessary for me to determine whether Remington as a single employer with HSS, also violated that Act by discharging these employees on October 19. As they would be entitled to reinstatement and backpay either as a result of the illegal discharges on August 20 or the illegal refusals to hire on October 19, the remedy would be the same.[9]

D. Other Alleged 8(a)(1) Violations

Apart from what has already been described, the General Counsel presented a number of employee witnesses who testified to conversations with Osiris Arango, the hotel's local human resource director, and with Percida Rosero. It is contended that these two persons violated Section 8(a)(1) of the Act either by engaging in coercive interrogations or by making threats of reprisal. As previously noted, Rosero did not testify so the testimony about what she said, stands uncontradicted. As to Arango, although she conceded that she did have similar conversations with these employees, she denied those aspects that are alleged to be unlawful. Because of the mutually corroborative nature of their testimony and also based on demeanor factors, I shall credit the General Counsel's witnesses.

According to Maritza, on August 21, 2012, the day of the transfer to HSS, she asked Percida Rosero what was going on and Rosero said that this was happening because of the Union. She also testified that Rosero stated that other things were going to happen. I construe this as a threat of unspecified reprisals which is violative of Section 8(a)(1) of the Act.

Delia Berti Reyes Granados testified that in early August (before the transfer of the housekeeping employees to HSS), Osiris Arango asked her if the two people from the Union had spoken to her. Granados states that she said no and Arango asked what benefits the Union would give her. According to Granados, she responded that she didn't know. In my opinion, this constitutes coercive interrogation and is violative of Section 8(a)(1) of the Act.

Josefina Jurado Portillo testified that on or about August 28, she asked Arango about her health insurance and then after they went to the latter's office, she was asked, "[W]hat do you know about the Union." In this respect, I conclude that this is unlawful interrogation within the meaning of Section 8(a)(1) of the Act.

Noris Gutierrez' testimony was that in late August or early September 2012, Osiris Arango called her into her office and asked if she knew of anyone who was talking to the Union. When Gutierrez responded no, Arango said that the Union was not good. In my opinion, this constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act.

Estela Cabrera testified that on or about September 5, 2012, she had a conversation with Arango in her office and was asked if she knew anything about the Union. According to Cabrera, she told Arango that she didn't know anything about the Union because she had been on vacation and that Arango said that the Union was not good. Cabrera states that Arango reminded her that when the housekeepers went to work for HSS, their pay

[8] I note among other things, that none of the witnesses called by Remington could testify as to who actually made the decision to not hire the housekeeping employees or when that decision was made. All asserted that they did not make the decision but were told of it shortly before October 19, 2012. Whoever the decisionmaker was, that person was not called as a witness by the Respondent.

[9] Because Remington retained supervisory control over the housekeeping employees after their transfer to HSS, I would also conclude that Remington and HSS were joint employers of these employees during the period from August 21 to October 19. See *International Transfer of Florida, Inc*., 305 NLRB 150 (1991); *Laerco Transportation*, 269 NLRB 324 (1984), and *Capital EMI Music, Inc*., 311 NLRB 997, 1000 (1993), enfd. sub nom. *Al-Wahhab,* 23 F.3d 399 (4th Cir. 1994).

had been increased. Based on the credited testimony of Cabrera, I conclude that the Respondent coercively interrogated employees in violation of Section 8(a)(1) of the Act.

Ana Salgado testified that in mid-September 2012, she was asked by Percida Rosero if she was going to a meeting with the Union that the women were having. Salgado responded that she wasn't aware of such a meeting and Rosero said that HSS had found out that they were holding a meeting. As previously noted, Rosero was not called as a witness and I therefore conclude that these remarks constitute unlawful interrogation in violation of Section 8(a)(1) of the Act.[10]

Francis Lopez testified that in late September 2012, she had a conversation with Arango in the latter's office in which Arango asked if she knew what the Union was. According to Lopez, when she said no, Arango explained that the Union was there to protect the employees but that it wasn't good because the employees had to pay them a lot of money. Lopez testified that Arango asked her what other employees were saying about the Union and asked her if she signed a union card. According to Lopez, Arango stated that if they found out, they would fire everybody. (In fact, as described above, less than a month later everybody was fired.) Based on the credited testimony of Lopez, I conclude that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee and threatening to discharge employees if they joined or supported the Union.

Reina Trejo testified that in or about the middle of September 2012, she had a conversation with Arango when she was working on the sixth floor. She testified that while training a new employee, Arango came into the room, asked the other person to wait outside and after a brief discussion of employee benefits, asked if she would go with the Union or stay with the hotel. Trejo responded that if the Union gave her better benefits, then she would go with the Union and if the hotel gave her better benefits then she would go with the hotel. According to Trejo, Arango said that the Union was two faced and that it would take a percentage of what she earned. Although not earth shattering, I conclude that this also constituted unlawful interrogation in violation of Section 8(a)(1) of the Act.

In addition to the conversations that have been described above, the General Counsel alleges that three leaflets distributed by Remington to employees in January 2013, violated the Act. These are as follows:

> **Fact #2**
> Question:
> Would the enforcement of work rules change if the Union is voted in?
> Answer: YES! The rules would be applied and enforced more strictly. Right now, managers have a lot of flexibility and room to be fair. We believe in "extra chances" (except for very serious violations).
> In a Union hotel, that would go away. The rules would have to be enforced *very* rigidly. That's just the way it is in 'union' companies—employers are *afraid* of "doing favors"; *afraid* of being flexible.
> Why is that? Because "union" companies worry that when they give an otherwise good employee an "extra chance", the union will use it against them later on — by a grievance filing—when the same violation is committed by an employee who really does deserve to be fired.
> *This is a bad thing for good employees.*
>
> **Fact # 5**
> Question:
> Obviously, the Union will ask for higher wages, more benefits and less work. The Hotel will have to agree to this . . . right?
> Answer:
> Let's be realistic. Some things may go up. But, if that happens other things will go down.
> Think about your "Real Wage Pie Chart." The Pie doesn't get bigger just because the Union wins the election. The Hotel can only pay what it can afford.
> The Pie only gets bigger if. . . .
> More guests stay her, and
> Spend more money.
> Good guest service grows the Pie . . . . Not the Union.
>
> **Fact # 6**
> Question:
> What happens if no agreement is reached?
> Answer:
> Everything could stay the same: No increases at all! . . . It is not unusual for unions and employers to go years without reaching agreement.
> Example: At Remington's hotel in Alaska—The Anchorage Sheraton—the Union has tried without success since February 2009 to get a new agreement. The employees there haven't had an across-the board pay increase since February 2008—*almost 5 years now*!

These pieces of propaganda are of a type that is fairly typical in union election campaigns. As to fact 5 and fact 6, I don't think that either constitutes a threat of reprisal or a threat that certain benefits would be withheld if the Union were to win an election. The statement that the hotel can only pay what it can afford, is simply a general truism and the statement as a whole, cannot, in my opinion, be reasonably understood by employees that by selecting a union, they would necessarily lose some of their existing benefits as a result of bargaining. Similarly the questions and answers in fact 6 are opinions as to how long bargaining could theoretically take during which, in the absence of an interim agreement, the status quo might be maintained.[11]

[10] This might also be construed as the Respondent giving employees the impression of surveillance, but that was not alleged in the complaint.

[11] I note that the reference in fact 6 to the situation at the Sheraton Anchorage, brings to mind that on April 24, 2013, the Board issued a Decision and Order in *Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage*, 359 NLRB No. 95. In that case, the Board found that this Employer, represented by the same law firm, violated the Act by among things; (1) changing the employees' terms and conditions of employment after contract expiration without first providing at least 30 days' notice to Federal Mediation & Conciliation Service; (2) unilaterally implementing a new health benefit plan without first bargaining to impasse or agreement; (3) disciplining off-duty employees for presenting a petition to the Employer in the lobby; (4) discharging

On the other hand, it is my opinion that the statements in fact 2 do constitute a threat that if a union was selected and a contract reached, the company would more strictly enforce its existing disciplinary rules. As such, I conclude that in this respect, Remington violated Section 8(a)(1) of the Act. See *Olympic Supply, Inc. d/b/a Onsite News*, 359 NLRB No. 99 (2013).

E. The Discharge of Margaret Loiacono

The complaint alleges that the Respondent discharged Loiacono on January 2, 2013, because Remington believed that she assisted the Union and engaged in concerted activities and to discourage employees from engaging in those activities. A problem here is that Loiacono did not join the Union or assist it in any other way and she did not, in my opinion, engage in what can be described as concerted activity within the meaning of Section 7 of the Act. The issue therefore is whether the evidence would support the contention that notwithstanding the above, the Respondent discharged this employee (before her probationary period had ended), because it believed that she engaged in such activities. And if that is the case, then the General Counsel would prevail.

The Respondent, on the other hand, argues that because her job was as a lobby ambassador, she can't do her job, if she wasn't in the lobby. It asserts that she was absent from the lobby for about 10 to 15 minutes on Sunday morning, December 30, 2012. It contends that this is a prime checkout time for guests and that it is important for a luxury style hotel to have the lobby ambassador give the guests a positive feeling as their last experience of their stay.

Loiacono was hired in September 2012, when HSS was still operating the housekeeping department. She was hired mainly as a lobby ambassador and she also functioned, part of the time, as a PBX operator. As a lobby ambassador, her responsibilities were to greet guests, be of assistance to guests, and to have a pleasant attitude when dealing with guests. She also, from time to time (along with other employees), drove a company van to take guests to various locations.

In late December 2012, the Company, as a part of its prospective election campaign, distributed to each employee a pie chart setting forth each employee's compensation and how it was divided. Loiacono was invited into Arpino's office and he gave her the pie chart while saying that Remington was giving employees a certain amount of money and that they couldn't guarantee anything with a union. She states that she told him that he didn't have to explain because she had been a member of a New York State employee union. During this conversation, Arpino told her that her work had improved and that she was doing a good job.[12]

After receiving the pie chart, Loiacono discussed it with Yohenna Borrero, a housekeeping supervisor, and said that the chart was incorrect as to Loiacono because it set forth an amount for uniforms and she didn't have a uniform. She asked Borrero if her chart was also incorrect and suggested that she check it over. Borrero said that she would. This probably occurred on December 30, 2012, and is likely the incident where the Respondent asserts that Loiacono was away from the lobby for 10 to 15 minutes.

On December 30, Loiacono asked to speak to Rostek and they went into his office. Loiacono said that there was a mistake in her pie chart because there was a section for a uniform allowance and she didn't have a uniform and didn't get a uniform allowance. She also pointed out that some of the pie charts for other employees might also have mistakes because although hers had a slice for health insurance, some employees did not take health insurance. She asked Rostek who made the pie charts and he said Osiris Arango. She suggested that they correct the charts and he said he would look into it and talk to Osiris.

Loiacono testified that later on December 30, Rostek held a conversation with her and two other employees in which he stated that it would take a long time to get a union contract and that there was no guarantees that we would get a raise. She also testified that Rostek said that even if they got a "contract and stuff," Remington wouldn't necessarily have to honor it. According to Loiacono, she responded that she was not for the Union or against it, but that she would probably be a nonunion employee.

Rostek's version of the earlier conversation is not much different from Loiacono's. He states that she brought up the mistake in her pie chart and that he thanked her for pointing it out. According to Rostek, he felt that she was simply trying to be helpful.

I note that Loiacono's complaint about the pie chart, as described by her own testimony, was not really a complaint about her actual compensation. It was simply a complaint about how her compensation was incorrectly represented on her pie chart. Nor was she speaking on behalf of other employees about their actual wages and conditions of employment. She was pointing out to Supervisor Borrero and General Manager Rostek a mistake in a pie chart that represented her own compensation and merely suggested (without talking to any other employees), that the Company may have made a mistake in the pie charts that it distributed to other employees.

In an email dated Monday, December 31, 2012, Arpino relayed to Rostek a statement from Yohenna Borrero regarding the conversation she had with Loiacono about the pie chart. Arpino states that he was told by Borrero that Loiacono asserted that since she didn't have a uniform, she should get paid the amount of money that was put in the chart for cleaning uniforms. His email goes on to state:

> Marge then explained that she was calculating from her house all of the money since she started working here that she should get for the dry cleaning and it was over $200. Marge was then waiting for today (Monday) to speak with Jeff and see his face when she asked for that money. Marge then said that she is not stupid and that is not legal, putting things that they are not getting and lying to the people and that was against the law. And that she was waiting for Ken to talk to

off-duty employees for distributing handbills under the hotel's porte cochere; (5) maintaining and/or enforcing certain employee handbook rules; (6) soliciting employees to sign a decertification petition; and (7) withdrawing recognition from the union.

[12] At an earlier point, she had been spoken to about her attitude and she had pledged to correct that aspect of her job.

> Jeff about it. Then she asked me if I send my clothes to the dry cleaner and I said "No". Then she said "then see they should pay you for that".

This email finally relates that Loiacono told Yohenna Borrero that she was going to bring the hotel to court after January 14, regarding her pay rate.

Loiacono was discharged on January 2, 2013, shortly before her probationary period was about to end. The termination report written by Arpino states:

> On 12/30/12 at approximately 11:30 AM, Marge was outside of her work area ignoring her duties as Lobby Ambassador as she was not engaged in work activities while in the Housekeeping office with Yohenna. Additionally, Marge has been spoken to in the past regarding displaying an attitude that does not meet the hotel's standards for hospitality and attitude.
>
> . . . .
>
> Our service scores continue to be some of the worst in Hyatt and Remington. During the time Marge was not performing Lobby Ambassador duties, numerous guests would have passed the lobby and not been offered assistance and service which is a Remington standard for Lobby Ambassadors and a key component of our service culture. On or about December 11th, Marge approached the General Manager to complain about the Van light being on and how this had been unrepaired for approximately four months; Jeff asked her if she had addressed this with the FO manager, Marge said no but that everyone was aware of this issue; Jeff asked Marge how did she know about this issue if she had joined us about three months prior, Marge responded that everyone knew about it but it was not repaired. A few weeks ago I, Andrew Arpino and Jeff Rostek, General manager had a conversation with Marge in regards to her responsibilities and attitude and how important her disposition was to impact the overall service scores, at this time no improvement has been observed.

What is peculiar here is that Arpino's email message regarding Lioacono's conversation with Yohenna Borrero is different from how Loiacono described this conversation in her own testimony. (Borrero did not testify.) And unlike Loiacono's rather bland description, the version reported to Rostek on December 31 is far more emphatic and colorful; even going so far as to relate a threat by Loiacono to sue the Company.

As of December 2012, the election petition was still pending before the Board's Regional Office. And the pie charts that were distributed to the employees were part and parcel of the Respondent's campaign to convince employees to vote against the Union. In these circumstances, it seems to me that the Respondent's view of Loiacono's reported extravagant reaction to the pie charts could likely have led management to view her as a potential thorn in the side when it came to other campaign literature that it intended to issue as an election drew nearer. (As noted, Loiacono had told Rostek that she had been a member or a New York State employee union.)

Even though Loiacono did not join or support the Union or engage in concerted activity with other employees, I cannot escape the conclusion that it is more probable than not, that the Respondent's management viewed her as a potential obstacle in relation to their own election campaign propaganda. Accordingly, I conclude that by discharging Loiacono, the Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and on the entire record, I issue the following conclusions and recommended[13]

CONCLUSIONS OF LAW

1. By contracting out the work of the housekeeping department and thereby discharging the employees in that department on August 20, 2012, because of their membership in or activities on behalf of Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades, or because of their protected concerted activities, Remington violated Section 8(a)(1) and (3) of the Act.

2. By refusing to offer employment to the employees of HSS who were employed in the housekeeping department on October 19, 2012, because of their union or protected concerted activities, Remington has violated Section 8(a)(1) and (3) of the Act.

3. By discharging Margaret Loiacono because it believed that she would impede the Respondent's electioneering campaign, the Respondent violated Section 8(a)(1) of the Act.

4. By interrogating employees about their activities in relation to the Union, the Respondent has violated Section 8(a)(1) of the Act.

5. By notifying employees that it would more strictly enforce workplace rules if the Union was selected as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with discharge and other reprisals if they joined or selected the Union, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its housekeeping employees on August 20, 2012, and having illegally refused to hire the housekeeping employees working at the Hyatt hotel in Hauppauge, Long Island, on October 19, 2012, it must offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enfd. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the employees in writing that this has been done and that the unlawful discharges will

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

not be used against them in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Finally, because of the extensive nature of the unfair labor practices found to have been committed herein and because of the findings in the previously cited case involving the same employer, it is recommended that a broad order be issued.

ORDER

The Respondent, Remington Lodging & Hospitality, LLC., Hauppauge, New York, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Contracting out work and/or discharging employees because of its employees' actual or perceived membership or activities on behalf of Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades, or because of any other protected concerted activities for mutual aid and protection.

(b) Refusing to offer employment to individuals because of their union or protected concerted activities.

(c) Interrogating employees about their union or protected concerted activities.

(d) Telling employees that it would more strictly enforce workplace rules if a Union is selected as their bargaining representative.

(e) Threatening employees with discharge or other reprisals, if the employees choose to be represented by a union.

(f) In any other manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the housekeeping employees employed at the Hyatt hotel in Hauppauge, New York, as of August 20, 2012, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer employment to the housekeeping employees employed at the Hyatt hotel in Hauppauge, New York, as of October 19, 2012, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.[14]

(c) Within 14 days from the date of this Order, offer Margaret Loiacono full reinstatement to her former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make the above-described employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against those employees who have been found to have been illegally discharged, and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at the Hyatt Hotel in Hauppauge New York, copies of the attached notice marked "Appendix"[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 20, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 15, 2013

[14] The fact that Remington hired other employees before and after October 19, 2012, for the housekeeping department at the hotel should not be construed as meaning that those jobs no longer exist for purposes of this Order. The Respondent has the choice of replacing those employees with the discriminated employees or retaining the services of both sets of people.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or refuse to hire employees because of their membership or activities in Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades, or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT refuse to hire employees because of their union or protected concerted activities.

WE WILL NOT interrogate employees about their union or protected concerted activities.

WE WILL NOT tell employees that we would more strictly enforce workplace rules if a union is selected as their bargaining representative.

WE WILL NOT threaten employees with discharge or other reprisals, if they choose to be represented by a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL offer the housekeeping employees employed at the Hyatt hotel in Hauppauge, New York, as of August 20, 2012, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL offer the housekeeping employees employed at the Hyatt Hotel in Hauppauge, New York, as of October 19, 2012, employment to housekeeping jobs or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL offer Margaret Loiacono full reinstatement to her former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make the above described employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges and notify those employees, in writing, that this has been done and that those actions will not be used against them in any way.

REMINGTON LODGING & HOSPITALITY, LLC